Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

ASA WASHINGTON,
Petitioner,

- vs -

ERNEST C. ROE, Warden,
California State Prison at Lancaster,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Joel Levine
Counsel of Record
And a Member of this Court
Joel Levine, Esq.
A Professional Corporation
16000 Ventura Boulevard
Suite 500
Encino, California 91436
(818) 995-6052
Attorneys for Petitioner

84 pp

QUESTIONS PRESENTED FOR REVIEW

A. DID APPELLANT PROVE THAT HE RECEIVED INADEQUATE ASSISTANCE OF COUNSEL, UNDER BOTH THE COMPETENCY AND PREJUDICE PRONGS OF STRICKLAND v. WASHINGTON, DUE TO HIS COUNSEL'S FAILURE TO PRESENT AVAILABLE EVIDENCE AT TRIAL OF THE CRIMINAL LIABILITY OF A THIRD PARTY?

B. DID APPELLANT PROVE THAT HE RECEIVED INADEQUATE ASSISTANCE OF COUNSEL, UNDER BOTH THE COMPETENCY AND PREJUDICE PRONGS OF STRICKLAND v. WASHINGTON, DUE TO HIS COUNSEL'S FAILURE TO PRESENT TESTIMONY AT TRIAL OF AN EYEWITNESS IDENTIFICATION EXPERT OR TO PROPERLY PREPARE A PHOTOGRAPHER/WITNESS TO REFUTE THE TESTIMONY OF AN EYEWITNESS WHO PLACED APPELLANT NEAR THE CRIME SCENE?

C. WAS THE STATE EVIDENTIARY HABEAS CORPUS HEARING FAIRLY CONDUCTED SO AS TO COMPEL DEFERENCE TO ITS FINDINGS UNDER THE PROVISIONS OF THE AEDPA?

D. WERE THE STATE EVIDENTIARY HABEAS CORPUS FINDINGS CONTRARY TO OR AN UNREASONABLE APPLICATION OF FEDERAL LAW SO AS TO EXCUSE DEFERENCE TO SUCH FINDINGS UNDER THE PROVISIONS OF THE AEDPA?

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I

JURISDICTION AND CITATION OF OPINION

On November 15, 2001, a United States District Court denied Petitioner Asa Washington's (hereinafter "Petitioner") Petition for Writ of Habeas Corpus, adopting a Report and Recommendation of a United States Magistrate Judge. That Report is attached hereto as Appendix A.

On December 12, 2002, the United States Court of Appeals for the Ninth Circuit affirmed the District Court in a Memorandum Opinion, attached hereto as Appendix B. On February 21, 2003, the Ninth Circuit denied a Petition for Rehearing with Suggestion for Rehearing En Banc.

This Court has jurisdiction to review the decision of the Ninth Circuit pursuant to 28 U.S.C. § 1294.

II

CONSTITUTIONAL PROVISION AND STATUTES

The relevant Statute discussed in this Petition, 28 U.S.C. § 2254(d) is attached hereto as Appendix C. It is commonly referred to as the Anti-Terrorism and Effective Death Penalty Act (hereinafter "AEDPA").

III

STATEMENT OF THE CASE

A. THE CALIFORNIA STATE TRIAL FACTS

Petitioner, then a college student with no criminal record, was convicted of the first degree murder of his uncle, Burnett Washington. The uncle was murdered on September 4, 1992 at a business owned by Petitioner and a family trust. The murder occurred from three shotgun blasts.

There was no eyewitness to the shooting. A van was seen by approximately a dozen people leaving the area of the crime. Of these dozen people, one, Anthony Byrd, identified the driver as Petitioner. Byrd was able to see the van from 60 feet for a fraction of a second through a tinted window, and was only able to see the driver's upper portion of his body. Byrd's testimony was the only "evidence" placing Petitioner at the scene of the crime. Petitioner's fingerprints were not found on the shell casings found at the scene. Other evidence of an argument with his uncle was introduced through the testimony of the uncle's girlfriend. When the police came to arrest Petitioner a month after the crime, he tried to flee.

Petitioner's trial counsel conducted no investigation. He called two witnesses, Petitioner (with whom he conducted no preparation to testify) and Jack Lieberman, a photographer who attempted to take re-enactment photographs (who also was given no guidance on what his photographs should depict and for which trial counsel laid no foundation).

Predictably, through ineffective assistance of counsel, Petitioner was convicted and given a twenty-six year to life sentence, which he is

serving in California State Prison.

B. THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Briefly stated, the claims raised below were as follows:

1. Trial counsel made numerous errors on the record during trial, including making incoherent arguments, failing to phrase appropriate objections, and exhibiting behavior of one who was physically ill. Indeed, trial counsel was physically ill, was medicated during trial, and retired from the practice of law after this trial due to poor health.

2. Trial counsel's omissions outside the trial record included the following:

a. His failure to conduct any investigation at all, and his failure to hire an investigator.

b. His failure to present evidence of the third party culpability for this crime of Alan Washington, the decedent's son, who had been convicted of two attempts on the life of the decedent, had recently been released from jail, and had, upon his release, once again threatened the life of decedent.

c. His failure to hire a weapon's expert to testify that shells found in Appellant's home were not the same as those which killed decedent.

d. His failure to investigate or follow up on the police investigation of the van seen leaving the crime scene.

e. His failure to interview a probate attorney who

ended up giving damaging trial testimony.

f. His failure to spend any time with Appellant in preparation for Appellant's trial testimony.

g. His failure to call Appellant's cousin to testify as to Appellant's lack of motive to murder his uncle.

h. His failure to investigate, interview or call to testify persons who saw Appellant and decedent interact peacefully in the weeks before the homicide.

i. His failure to interview or call available character witnesses.

j.. His failure to prepare or ask the appropriate questions to a photographer witness, Mr. Lieberman, or to hire an eyewitness identification expert.

k. His failure to interview or investigate the one eyewitness who identified Appellant as the driver of the van after a fleetingly short view of that driver.

l. His failure to call the administrator of Appellant's grandfather's estate to testify that it was in Appellant's financial interest for the decedent to continue to live so that decedent could continue to work in a business in which Appellant was part owner. [This business closed upon the decedent's death].

m. His failure to interview witnesses to Appellant's purported effort to switch places at a police lineup.

C. THE CALIFORNIA HABEAS CORPUS EVIDENTIARY HEARING

Each of the claims referred to above were the subject of a hearing ordered by the Supreme Court of California. This hearing was held before the same Superior Court judge who presided over Appellant's trial. At the conclusion of this hearing, the Superior Court found reasons to deny each and every claim in summary fashion. As more fully set forth below, this hearing was a sham, was not conducted objectively, and was not entitled to any deference when Appellant's Federal Petition was advanced in District Court.

D. THE DISTRICT COURT'S DENIAL OF THE PETITION

The District Court's denial of habeas corpus relief was embodied in a forty-two (42) page Report and Recommendation of a Magistrate Judge. As to each of the claims raised, the Report deferred to the findings by the Superior Court judge, and citing the provisions of AEDPA, denied each claim. As to at least two of the claims raised, to wit: the failure to pursue third party culpability evidence and the failure to hire an eyewitness identification expert, the Report opined that the competency prong of Strickland v. Washington, 466 U.S. 668 (1984) had been proven, and that the prejudice prong of Strickland had not, but such a finding was referred to as a "close call" by the District Court when it granted a Certificate of Appealability. It wasquite clear from the Report's Conclusion that, absent the deference called for by AEDPA to state court findings, this Petition would have been granted. The Conclusion states as follows:

"As discussed above, petitioner has met the competence

prong of Strickland on at least two claims: failure to pursue the possible third party culpability defense, and failure to use an eyewitness identification expert. These two claims are, in effect, cumulative, in that, without a theory that a third party was the perpetrator, the defense was left, essentially, with a weak alibi, and the need to overcome a strong eyewitness identification. Furthermore, if this were de novo review, this court might well find that counsel's deficiencies prejudiced petitioner. However, because of the deferential AEDPA standard, in order to reject the state court decision in this case, this court would have to find that the trial court's decision, after an extensive evidentiary proceeding, was clearly erroneous or objectively unreasonable. The record does not support such a determination, based on either petitioner's two strongest claims, on any of his other individual claims, or on any cumulative effect of all meritorious claims taken together. Instead, this case appears to fall within the ambit of §2254(d) deference, as the statute has been interpreted in Williams, Van Tran, and Delgado..."

IV

ARGUMENT

A. INTRODUCTION TO ARGUMENT

Two global observations need to be made in this Petition, before

dissecting the specifics of the inadequate assistance claims made herein. First, with respect to counsel's performance at trial, in this case, Petitioner was essentially without competent counsel. Counsel was incoherent, was medicated and retired due to medical reasons immediately following the instant trial. Counsel's performance on the record at trial, and in his total lack of preparation or investigation, resulted in a complete breakdown of the adversary process. Since the Ninth Circuit proceedings focused on the prejudice prong of Strickland as it related to two of the claims (the third party liability claim and the failure to call an expert), the bulk of this Petition will focus on these claims. The others cannot, however, be ignored when assessing counsel's incompetence.

In addition, the deference typically afforded to state court proceedings under AEDPA should only occur when due process has been afforded in those proceedings. Here, as more fully set forth below it was not. As a result, the Petition should have been granted by the District Court.

B. TRIAL COUNSEL'S PERFORMANCE VIOLATED BOTH THE COMPETENCY AND PREJUDICE PRONGS OF STRICKLAND v. WASHINGTON IN THE FAILURE TO PRESENT AVAILABLE EVIDENCE THAT DECEDENT HAD BEEN KILLED BY HIS SON, ALAN WASHINGTON AND THE STATE COURT'S FINDINGS TO THE CONTRARY WERE AN UNREASONABLE APPLICATION OF FEDERAL LAW AND FACTUAL DETERMINATION

Trial counsel's failure to investigate and present available evi-

dence was exposed at the State evidentiary hearings on the State Petition for Habeas Corpus. There, it was established that, on two prior occasions, a son of the decedent had tried to kill him, and had been twice convicted.

The first beating took place because Burnett objected to his son's beating to death Burnett's dog. Alan Washington beat his father Burnett in the facewith a rock and tried to strangle him. Following this beating, Burnett was hospitalized for a period of four days. The second beating took place as Burnett was called to his home by his other children to intervene and placate his violent and drunk son, Alan, who had already torn apart Burnett's home and broken his vehicle's windshield. Alan beat Burnett so savagely that he knocked out five teeth, and broke his nose and jaw.

Following this beating, Burnett was operated on and was hospitalized for three days. Only the intervention of others prevented these beatings from being fatal. After the second beating, Alan, far from being contrite, threatened to kill Burnett (his father) and his two siblings upon his release from jail. Alan was released from jail nine months before Burnett's murder (the murder for which Petitioner was convicted). The police investigating Burnett's murder interviewed Alan, who gave them an alibi that, at the state habeas corpus hearing, was proven to be totally bogus.

Trial counsel, who conducted no investigation of his own, was aware of these vicious attacks as he was present when another attorney brought these facts to the fore at the preliminary hearing. Despite this knowledge, trial counsel never developed or presented this evidence. The jury remained unaware of these facts.

In the Superior Court, habeas corpus proceedings, the State did not and could not take the position with regard to this issue that these facts did not exist, that these attacks and their resulting convictions did not happen. Instead, the State took the position that the fact of the attacks were inadmissible and that the corresponding court records were inadmissible.

The State cited People v. Hall, 41 Cal 3d 826 (1986) and People v. Kaurish, 52 Cal 3d 648 (1990) as support for its position. It would appear that a reading of these cases would support quite the opposite position. Hall clearly stated the following:

> "We note that it is always proper to defend against criminal charges by showing that a third person, and not the defendant, committed the crime charged...To be admissible, the third-party evidence need not show "substantial proof of a probability" that a third person committed the act; it need only be capable to raising a reasonable doubt of defendant's guilt"...As this court observed in Mendez, evidence of mere motive or opportunity to commit the crime in another person without more, will not suffice toraise a reasonable doubt about a defendant's

guilt; there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." pp. 832-833 (emphasis added)

People v. Kaurish, supra, adopts the position enunciated in Hall and adds to the above principle, the following:

"The principles of law are clear. In People v. Hall, we rejected the rule that evidence of third party culpability could be admitted only if there was a substantial proof of probability of guilt.Rather, we held that the standard for admitting evidence of third party culpability was the same as for other exculpatory evidence: the evidence had to be relevant under Evidence Code section 350, and its probative value could not be substantially outweighed by the risk of undue delay, prejudice, or confusion under Evidence Code Section 352. p. 685.

These above cited cases recognize the importance of third party culpability evidence. The standard they have set is one easily met by Appellant in this case. The evidence was certainly relevant. The evidence's probative value was certainly compelling and significant, and clearly outweighed the risk of undue delay, prejudice and confusion. The links between the third person (Alan Washington) to the perpetration of the crime are clearly demonstrable. Alan Washington not only twice tried to

brutally kill Burnett Washington, not only twice was convicted of these actions, not only threatened to kill Burnett Washington upon his release from jail, not only was released from jail preceding the murder, not only shared a physical similarity with Petitioner, but the witness' descriptions, taken by the police, of the driver of the van more clearly identify Alan Washington than Petitioner.

The Ninth Circuit, in United States v. Crosby, 75 F.3d 1343 (9th Cir. 1996), dealt with the admissibility of this type of evidence. It pertained to a murder trial in which no evidence was introduced of another person having beaten the victim in the past and a finding that that other person was available to have done the beating in question. The Court found that the failure to present such evidence was reversible error, in contradiction to Respondent's assertion that the failure to present such evidence is not prejudicial.

> Circuit Court Judge Kozinski speaking for the Court wrote:
>
> "It showed that someone other than Crosby had the opportunity, ability and motive to commit the crime...If the defendant didn't beat Dorothy, who did? Introduction of the Hoskie evidence would have answered this question, rebutting the inference that Crosby must have committed the assault because no one else was in a position to do so.
>
> "The Hoskie evidence was also significant because there

was so little direct evidence of what actually happened" at p. 1347.

"The excluded evidence could thus have caused the jury to develop a reasonable doubt by suggesting that someone other than the defendant was in a position to have beaten Dorothy, that a competent investigation might have identified that person, and that Dorothy was lying when she pointed the finger at Crosby". at p. 1349.

The Court cited Evidence in Trials in Common Law by Wigmore which states:

"If the evidence that someone else committed the crime is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic, but should afford the accused every opportunity to create that doubt." at section 139.

In addition, a recent decision of the Ninth Circuit, Avila v. Galaza, 297 F.3d 911 (9th Cir. 2002), supports the assertion that the failure to present third party culpability evidence is ineffective assistance of counsel, even when there has been a state court finding to the contrary and where AEDPA requires deference to that finding. Remarkably, Petitioner's claim is even stronger than Avila's.

In Avila, Jesus Avila was convicted of attempted murder and claimed in his habeas petitions that his counsel ineffectively represented him by failing to present evidence that his brother, Ernesto, had committedthe crime. In Avila, the attorney who had represented Jesus, prior to the trial attorney's appointment, had been made aware of the brother's (Ernesto's) guilt, but had not made the trial attorney aware of this information.While conducting an interview with Jesus' mother, the trial attorney was told that were she to give information she would only be "exchanging one son for another". With that information, the trial attorney surmised that it was probably Ernesto that was guilty of the crime, and that Jesus [his client] was innocent. The trial attorney did avail himself of the services of an investigator and did conduct some pretrial investigation, but did not develop any evidence of the brother's guilt. In an effort to defend Jesus, the trial attorney did call a non-family member eyewitness who testified that it had not been Jesus who had committed the crime. After the trial concluded, family members and friends who had been present at the scene of the crime came forward to this trial attorney and told him that they had seen Ernesto commit the crime and that Jesus had had no part in the crime.

In Avila, there was a state court evidentiary hearing on these habeas corpus claims, and an independent referee made written findings which were reviewed in federal district court, and upheld under the deference principles of AEDPA. This Court reversed that decision holding that the deference was unwarranted, the state court's findings were unreasonable, and the prejudice prong of Strickland had been established.

Compared to the instant case, the trial representation in Avila, which ultimately resulted in a holding that it was unreasonable to conclude the prejudice prong of Strickland had not been met, was a model of competency. Trial counsel's performance in the instant case, and the prejudice to Petitioner, were far more acute then in Avila.

Unlike the attorney in Avila, trial counsel herein was fully aware of the culpability of someone other than his client, Petitioner. The preliminary hearing had made trial counsel aware that the victim's son (Alan Washington) had twice been convicted of attempting to kill this same victim. Trial counsel was also told that after Alan Washington's last conviction, Alan Washington threatened to kill his father after his release from custody. Alan was released nine months before the murder in the instant case. Trial counsel, had he done any investigation, would have learned that witnesses could testify that Petitioner and the victim had been amiably together after the date of the argument that Burnett's girlfriend testified to, yet these witnesses were never called.

Unlike the attorney in Avila, the exculpatory evidence was not limited to statements by family members or friends who might have been biased. Trial counsel, instead, would have had available to him court records substantiating convictions of Alan Washington which the trial court could have taken judicial notice of.

Unlike the attorney in Avila, family witnesses came forward to

trial counsel personally well before the commencement of trial with some of the exculpatory evidence.

Also, unlike the attorney in Avila, trial counsel never hired an investigator and conducted absolutely no investigation. Despite taking funds from Petitioner's family to hire an expert on eyewitness identification, none was ever hired. The only trial witnesses called were Petitioner and a photographer, both of whom were not prepared to testify.

Petitioner was prejudiced under Strickland, by trial counsel's failure to investigate or represent evidence of the third party liability of Alan Washington for these crimes. Had he represented such evidence, a reasonable doubt as to Petitioner's guilt would have been established. The Petition for Writ of Habeas Corpus should have been granted.

C. THE STATE COURT'S EVIDENTIARY HEARING AND FINDINGS WERE AN UNREASONABLE DETERMINATION OF THE FACTS AND AN UNREASONABLE APPLICATION OF FEDERAL LAW WITH RESPECT TO TRIAL COUNSEL'S FAILURE TO CALL AN EYEWITNESS IDENTIFICATION EXPERT WITNESS AS HE HAD PROMISED AND BEEN PAID TO PRESENT

The most critical witness against Petitioner, at this trial was Anthony Byrd, who was the sole eyewitness to testify that he saw Petitioner leaving the scene of the crime. The state court judge, in part, rested his finding that the issue of third party culpability was not prejudicial because Mr. Byrd's testimony was so persuasive.

Yet, objectively speaking how persuasive could Mr. Byrd's testimony have been. Mr. Byrd had a limited opportunity (a side view of a driver in a moving vehicle for a fraction of a second from 60 feet through tinted windows) to view the driver. Mr. Byrd testified at the preliminary hearing that the driver of this vehicle had facial hair and was Latino. Petitioner neither had facial hair at the time of this murder, nor is he Latino. Moreover, there were numerous other "witnesses" at the scene who, quite predictably, could not make this identification.

An eyewitness identification expert would have demonstrated to the jury how very questionable Mr. Byrd's identification of Petitioner was due to the extreme distance, the miniscule chance of observation, and the psychological ramifications of identifications. Such an expert would have been crucial in a case in which there had been no eyewitness to the murder itself, but simply a fleeting glimpse of the driver of a van leaving the scene.

It was obvious that it was essential to Petitioner's defense that Byrd's testimony be refuted; even Petitioner's family (laymen) were aware of this and so gave trial counsel the funds that they had pooled to hire such an expert. Trial counsel never did hire this expert.

The District Attorney, also, expected that such an expert would be hired and stated so. She told the Court that she expected that the defense was about to call a "traditional eyewitness expert", one who was a doctor of psychology.

In place and in stead of the eyewitness expert, trial counsel hired Mr. Lieberman, a photographer to whom he gave no guidance on what his

photographs should show and no preparation with regard to how to present his photographs to the trier of fact, despite Mr. Lieberman's efforts to obtain such guidance. This lack of guidance further highlights trial counsel's lack of focus, preparedness and incompetence. Trial counsel, basically, did nothing to prepare Mr. Lieberman to testify, and did less in providing authentication so that what efforts Mr. Lieberman had made might become apparent to the jury. Even after being advised by the Court that a foundation would need to be laid and advised by the prosecutor as to how that foundation might be laid, trial counsel refused to do so. This incompetence resulted in the heart being cut out of the efforts expended by Mr. Lieberman, the photographs showing the van and driver were excluded.

On another note, Mr. Lieberman, himself, observed that something was indeed wrong in that trial counsel seemed unfocused and preoccupied. He did not seem to be mentally "present", in other words, he did not seem to be paying attention to the task at hand. Trial counsel failed to give him any guidance vis a vis the work he was to produce on Petitioner's behalf; instead he simply said that he, Lieberman, should do whatever he thought he should do. Mr. Lieberman, also, found trial counsel unable to focus when he and trial counsel got together after the photographs had been taken, developed and printed. Mr. Lieberman reported that trial counsel did not seem to listen to what Mr. Lieberman had to say. Further, trial counsel made only a superficial attempt to prepare him to testify. He simply gave him advice as to demeanor, but said nothing with regard to

testifying about his (Mr. Lieberman's) educational background, occupational experience or the substance of the photographic work product.

The combined effect of these omissions was to leave any critical analysis of Byrd's testimony solely in the incompetent hands of trial counsel in final argument. A reading of that final argument shows that once again trial counsel's performance fell woefully below the Strickland standard, as his argument was essentially incoherent. The jury was thus left with Byrd's unchallenged testimony, rather than being made aware of the inadequacies and unreliability of eyewitness identification testimony.

D. DEFERENTIAL REVIEW OF THE SUPERIOR COURT CONCLUSIONS WAS UNWARRANTED

The proceedings in the Superior Court were not an objective fact finding process designed to fairly adjudicate Petitioner's claims. Moreover, the so-called "findings" were contrary to and involved an unreasonable application of clearly established federal law, and also, were based upon an unreasonable application of the facts adduced at the hearing.

Implicit in decisions below was deference to findings made in the Superior Court is the confidence that those proceedings constituted a fair hearing. The deference called for under 28 U.S.C. § 2254(d), as enunciated in Williams v. Taylor, 529 U.S. 362 (2000), is not required if the adjudication in the state court was either contrary to or an unreasonable application of clearly established federal law, or was an unreasonable application of the

facts based upon the evidence presented. If either exists, deference does not occur and a de novo review of the claims are required. Rose v. Lee, 252 F. 3d 676 (4th Cir. 2001).

Indeed, in Avila v. Galaza, supra, the Ninth Circuit reversed the denial of the habeas petition, after state court hearings had been conducted, because those hearings reflected an unreasonable application of the facts based on the evidence presented at those hearings.

Various things which occurred before and during the state hearing herein should, at a minimum, cast doubt upon the confidence of any findings, compelling a denial of deference. These are inter alia, as follows:

1. The Superior Court initially refused an evidentiary hearing, and only held one after being ordered to do so by the State Supreme Court.

2. The Superior Court Judge presiding over the trial and these hearings saw no reason to disqualify himself from the latter. Yet, at the hearings, he relied upon his own observations of trial counsel's physical condition and trial counsel's competency to deny the Petitioner's claims. Part of his own observations included his personal opinion of the trial prosecutor as being the best trial attorney he ever observed, and that even better representation of Petitioner at trial could therefore not have achieved a different result.

3. Trial counsel, about whom a claim of inadequate assistance is made, typically participate in some manner at such hearings. Here, trial counsel did not, in large part because the Superior Court judge reversed himself in producing trial counsel. Initially, the Superior Court was not

satisfied that trial counsel's current medical condition (which he apparently began to suffer from when representing Petitioner just prior to becoming officially disabled medically) should prevent him from participation at these hearings. The Superior Court initially was prepared to order trial counsel's physician to testify and find the doctor-patient privilege waived.

Yet, the Superior Court later did an about-face, and ordered the physician not to testify, when it became apparent that trial counsel's health would eventually support Petitioner's claims. Instead, the Superior Court found that the physician's presence was unnecessary by inserting the Court's own "observations" of counsel at trial. The Superior Court thus refused to take the risk that trial counsel's physician would testify that trial counsel was seriously ill at the time of trial, and instead inserted his own opinion about trial counsel's health.

Prior to trial, it had become apparent in the Superior Court and all the parties that trial counsel was ill. He had been suffering for a period of months with extreme high blood pressure, and at one point in time, was required to seek a continuance of the trial due to his ill health.

During the trial, trial counsel was medicated heavily with the drugs – Prinivil and Prinzide. Both of these drugs are designed to treat persons suffering from high blood pressure. Among the side effects of these drugs are memory impairment, sleepiness and confusion.

During the course of the trial, Petitioner's aunt, Blanche Washington Butler, observed trial counsel taking medication. Several times she was

asked by him to get him some water with which to take his medication. Trial counsel told her that he had not been sleeping well during the trial, as he had been under a great deal of stress due to family problems - - particularly, the death of his sister's daughter. Trial counsel told Ms. Butler that he was sleepy and he appeared to be confused. Trial counsel would walk away and leave things behind.

On many occasions during the trial, another of Petitioner's aunts, Anita Washington Murphy, would speak with trial counsel. Mrs. Murphy has a B.A. in Psychology and a Doctorate in Pharmacology. Mrs. Murphy became aware of trial counsel's slurred speech during their conversations. He appeared to be confused, dull, and at the same time, nervous. He was, also, not responsive. On one occasion he told her that he had a cold, and asked her about taking antihistamines. Mrs. Murphy advised him against taking these medications.

Given trial counsel's serious ill health, the more competent witness to have testified with regard to trial counsel's health was the physician himself. Petitioner was thus handicapped in his efforts and forced to proceed before a judge who was now a witness, and advocate. Petitioner was forced to proceed without the most important fact witness in the inquiry regarding inadequate assistance.

At the same time, trial counsel's apparently severe medical condition was thus given no weight whatsoever in any findings. An objective review of trial counsel's health reveals that the case at bar was trial counsel's last trial - his last trial due to orders from his doctor that he

desist from such further activity. An objective review of trial counsel's health reveals that trial counsel's performance was not simply inarticulate, but incoherent, a conclusion that this Court can see for itself by a reading of the trial transcript.

An objective review of trial counsel's health reveals that Petitioner's claims of trial counsel's deficient performance were not "taken out of context" or "erroneous" as the Superior Court held. A clear reading of the trial transcript demonstrates that trial counsel's incoherence was real and devastating to Petitioner's defense. A clear reading of the trial transcript demonstrates that Petitioner, in essence, had no counsel whatsoever.

4. During the inquiry regarding third party culpability for the crime (Alan Washington), the Superior Court consistently relied upon the police being satisfied as to Alan Washington's alibi at the time of the murder, as he expressed it to them in a taped interview.

During the evidentiary hearings, it became apparent that the police witnesses were either mistaken or downright untruthful. The tape of the interview was introduced, yet the Superior Court trial judge refused to listen to it. The tape showed that Alan Washington had given a completely different alibi (being at a particular job center), than the one which the police testified that they had checked out (The Milner Hotel). In other words, the police had never truly checked out the alibi that Alan Washington had given. The Superior Court remained adamant that the

police had checked out an alibi and relied on the police's investigation with regard to this alibi.

Had the real alibi been investigated, it would have failed. Alan Washington's job counselor at the job center was called at the state habeas hearing and belied the purported alibi. Having demonstrated that the correct alibi would have not been supported by the evidence, the Superior Court still continued its reliance on the police work with regard to Alan Washington's alibi.

To add to these factors, the Superior Court's refusal to listen to the tape, though it had been admitted, demonstrated that this trial court judge was uninterested in hearing or seeing anything which might force him to abandon his determined stance to uphold his reliance on the police investigation of Alan Washington's alibi. The refusal to hear this taped interview of Alan Washington most clearly demonstrates the lack of due process that Petitioner was accorded. At no time was this hearing a fact finding process.

5. The Superior Court had photographs of Alan Washington to compare withthose of Petitioner, but instead chose to ask the case prosecutor for her comparison of their physical attributes. She responded that the two were different.

In truth and in fact, Petitioner and his cousin, Alan Washington, bear a great resemblance to each other. They are both light skinned African-Americans. They both are large individuals – each standing six feet tall. They both are large framed – Petitioner weighing in (at the time

in question) at two hundred pounds and Alan weighing in (at the time in question) at one hundred ninety five pounds.

The primary differentiation between these two cousins was and is that of age. At the time involved herein, Petitioner was twenty-one years old and Alan was thirty-five years old. Two of the eyewitnesses to the departure of the van from the scene of the crime, Bob Dwight Brunner and Donald Jose Montes, described the driver of the van as being in his thirties – a description that more nearly fits that of Alan, rather than Petitioner.

It should be noted, that while we dissect the minor differences between Petitioner and his cousin, Mr. Byrd (the sole eyewitness) had no such opportunity to dissect these differences. Mr. Byrd had no such opportunity to conduct a meticulous comparison. These minor differences would have rendered Petitioner indistinguishable from his cousin to the eye of Mr. Byrd given the sheer distance and fleeting nature of his "observation" of the driver.

The photographs admitted into evidence do not support the prosecution's characterization that these two individuals (Petitioner and his cousin, Alan) are quite dissimilar in appearance. The photographs speak for themselves and should have spoken for themselves in the hearing. These photographs represent the objective comparison of these two individuals.

The prosecutor's opinion should have been of no consequence. Yet, the prosecution's opinion and characterization carried the day for it was the prosecution who provided the guidance upon which the trial court rested its finding. The prosecution claimed that these two individuals were

very different and so the Superior Court found.

It must be said that Petitioner has truly never had his day in court as he, functionally speaking, never had counsel to provide a defense; this in a case in which the evidence against him was thin and the defense evidence which might have been brought before a jury was overwhelming.

The deference that has been afforded the Superior Court proceedings has been unjustified. The hearing held in the Superior Court was simply a sham. It must be highlighted that each and every finding that the Superior Court made were adverse to Petitioner. The findings of the Superior Court flew in the face of truth and justice and were contrary to and involved an unreasonable application of clearly established federal law and were based upon an unreasonable application of the facts adduced at the hearing.

V

CONCLUSION

For the reasons cited herein, Petitioner prays that a Writ of Certiorari issue to review the judgment of the Ninth Circuit.

Dated: May 1, 2003

Respectfully submitted,

JOEL LEVINE, Esq.

A Professional Corporation

By _____

Joel Levine, Esq.

Attorneys for Petitioner

Asa Washington

APPENDIX A

FILED
CLERK, U.S. DISTRICT COURT
OCT 26 2001
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ASA WASHINGTON,

Petitioner,

v.

ERNEST ROE (Warden),

Respondent.

No. CV 96-8315-WDK(CW)

Report and Recommendation of United States Magistrate Judge

This Report and Recommendation is submitted to the Honorable William D. Keller, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the U.S. District Court for the Central District of California. For reasons discussed below, the petition for habeas relief should be denied and this action dismissed with prejudice.

I. PROCEDURAL HISTORY

Petitioner Asa Washington challenges his conviction in California Superior Court, Los Angeles County. On August 20, 1993, a jury found petitioner guilty of the first degree murder of his uncle, Burnett Washing-

ton, and found that he was armed with a firearm during commission of the murder. [Clerk's Transcript ("CT") at 238.] The trial court sentenced him to twenty-six years to life imprisonment. [CT at 249.] The California Court of Appeal affirmed the conviction and the California Supreme Court denied review. [Return ("Ret.") Exhibits ("Exs.") D & F.]

Petitioner then filed state habeas petitions, claiming ineffective assistance of trial counsel, which the superior court and the court of appeal denied. [Ret. Exs. G & I.] However, in response to a further habeas petition, the California Supreme Court ordered the Director of Corrections to show cause, in further proceedings before the trial court, why relief should not be granted. [Ret. Ex. K.]

The judge who presided over the original trial then heard argument and held an evidentiary hearing on specific issues. [See Reporter's Transcript of Evidentiary Hearing, attached to the instant Petition ("Pet.") as Ex. 6.]

At the end of this proceeding, the trial court made oral findings of fact and conclusions of law, and denied the petition, ruling that petitioner had failed to show constitutionally ineffective assistance of counsel. [Pet. Ex. 6 at 356-386.] Petitioner then filed a renewed habeas petition [Ret. Ex. L], which the California Supreme Court denied in an Order stating simply: "Petition for writ of habeas corpus DENIED on the merits." [Ret. Ex. M.]

Petitioner filed the instant petition and supporting exhibits on November 27, 1996. Respondent filed a return ("Ret.") on January 27, 1997, and petitioner filed a traverse ("Tra.") on February 10, 1997.

Petitioner has also filed additional submissions of recent case authority, which have been fully considered. This matter has been taken under submission without oral argument.

II. SUMMARY OF TRIAL EVIDENCE

A. PROSECUTION CASE

According to the medical examiner's testimony, Burnett Washington suffered shotgun blasts to his face, arm, and back, and died from a shotgun blast to his head. [Reporter's Transcript ("RT") at 66-71.] No one witnessed the murder itself, but several witnesses in the vicinity of the family business where Burnett was killed heard gun-shots. [RT at 57-62 (Harold Ladin), 154-159 (Mike Aubrey), 172-174, 176-177 (Robert Brunner), 184-186 (Donald Montes), and 251-252 (Anthony Byrd).] Several witnesses also saw a white Toyota van speed away from the scene of the crime shortly after the shots. [RT at 57-62 (Harold Ladin), 172-174, 176-177 (Robert Brunner), 184-186 (Donald Montes), and 251-255, 257 (Anthony Byrd).]

One witness, Anthony Byrd, was working in a recording studio across the street from Burnett's place of business. [RT at 251-252.] On hearing the shots, he walked outside and saw someone enter the driver's side of the white van. He saw the van back out of the driveway, come to a stop with the driver's-side window toward him, and quickly drive away. [RT at 251-255, 257.] When the van stopped, Byrd saw the driver's left side from the lower rib level up, including the left side of his face. [Id.] Byrd picked petitioner's photograph out of a police line-up and identified petitioner at trial as the driver of the van. [RT at 113-114, 118-122, 257, 263-264, 281.]

On cross-examination, Mr. Byrd admitted that he only got a "glimpse" of the driver's face [RT at 271-272.] He also conceded that he was fifty to sixty feet away from the van when he saw the driver's face. [RT at 275-276.] None of the other witnesses could identify the driver of the van. The victim's fiancee, Janice Fotenette, testified that petitioner and his cousin Randall Washington [Burnett's son] had engaged in a heated argument with the victim some two months before the murder. [RT at 203-210.] The subject of the argument was Burnett's suspicion that petitioner and Randall had vandalized Fotenette's car.[1] [RT 205-206.] During the argument, Fotenette testified, petitioner repeatedly threatened to kill Burnett. [RT at 207-210.]

On cross-examination, counsel questioned Fotenette about her involvement in Burnett's financial affairs. After the trial court sustained a prosecution relevancy objection, a side-bar conversation ensued. During that conversation, the prosecutor insisted that the only relevant information petitioner's counsel could secure from Fotenette was whether anyone else had threatened to kill Burnett, including Burnett's [other] son, Alan Washington [Randall's brother]. The prosecutor then expressed her intention, if petitioner's counsel asked such questions, to inquire into other things Burnett had told Fotenette, some of which would be damaging to petitioner. Petitioner's counsel stated that he was not going to ask Fotenette about other

[1] Randall was also originally charged as a co-defendant in Burnett's murder and was bound over for trial. [CT at 114.] However, the court dismissed the charges against him before trial started. [RT at 9.]

threats on Burnett's life, because it would be "improper" and would "open the door" for the prosecution. [RT at 214-219.]Mike Aubrey, who worked in the business next to Burnett's, testified that he had seen petitioner with shotguns on two occasions.

On one of those occasions, several months before the murder, petitioner was entering the family business in order to saw the barrels off two shotguns because of a "problem" he was having with some people. [RT at 163-166.] On another occasion, Aubrey saw petitioner polishing another sawed-off shotgun. [Id.] On the day of the murder, the police searched petitioner's room and found shotgun shells similar to shells found at the murder scene. [RT at 90-103.]

Officers Medina and Hooks testified that they went to petitioner's house to obtain a profile photograph. [RT at 112-113, 283, 441-442.] Petitioner refused to cooperate, citing the advice of his attorney. [RT at 442-443.] A month later, Medina and other officers went to petitioner's home to arrest him. [RT at 114-115, 451-452.] After placing a ruse phone call to determine whether petitioner was home, the officers knocked on the front door, announced their identity, and stated that they had an arrest warrant. [RT at 115-117, 454-459.] Petitioner then fled out a side door and over a wall, and did not surrender for thirty to forty-five minutes, during which the police had deployed a helicopter and threatened to deploy a K-9 unit. [Id.] Deputy Giandomenico testified that he arranged for a live line-up, including petitioner. [RT at 78-79, 81-82, 84-85.] When the line-up reached the stage, Giandomenico noticed that petitioner and a man standing next to him had switched placards and positions. [Id.]

B. THE DEFENSE CASE

Defense counsel called only two witnesses: petitioner and photography expert Jack Lieberman.Petitioner denied killing his uncle. [RT at 342.] He testified that he had spent the entire day of the murder with his cousin Randall at Magic Mountain. [RT at 330-333, 341-342.] He did not learn of Burnett's death until Randall telephoned his sister Rochelle Washington as they were leaving the park. [Id.] Petitioner admitted that he and Randall had a heated argument with Burnett about Fotenette's car.

However, he denied ever threatening to kill his uncle. [RT at 334-335.] Petitioner testified that he had never owned a gun, other than a BB gun. [RT at 337-338.] He claimed that shotgun shells found in his house had belonged to his late grandfather who had lived there, and that the shells had been lying around for years. [Id.]

Petitioner testified that he was intimidated into switching places in the police line-up by a larger man who insisted "almost to the point of force." [RT at 342-343.] He also testified that he ran away when the police came to arrest him because he had been receiving strange phone calls and was scared. He claimed to have only gone to a local convenience store and to have returned an hour later to surrender. [RT at 393-396, 451, 495.]

On cross-examination, petitioner testified that he had been accepted to Grambling University in Louisiana before the murder. He claimed thathe chose not to go because he wanted to stay and find out what had happened

to his uncle. He claimed that his mother had the acceptance letter. [RT at 372-373.]

Finally, Jack Lieberman, owner of a company that produces photographic evidence, testified about his measurement of distances at the crime scene. He prepared a diagram of the site, showing 55 feet between the studio where Byrd was working and the middle of the street, 80.6 feet from Byrd's vantage-point to the middle of the road, and 195 feet from Byrd's vantage-point to Burnett's business. [RT at 312-315, 317.] The diagram was admitted into evidence, along with a photograph taken from Byrd's vantage-point, looking across the street toward Burnett's business. [RT at 305-310.] Lieberman had also prepared two photographs taken from Byrd's vantage-point, with images of a van and a person superimposed on them. The trial court refused to admit these into evidence. [Id.]

III. PETITIONER'S PRESENT CLAIMS

Petitioner claims that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment because of multiple errors by his trial counsel, both in and outside the trial record.

A. ERRORS IN THE TRIAL RECORD

Petitioner contends that, before and during trial, defense counsel Charles Lloyd was ill, and taken medications with significant side-effects (memory impairment, sleepiness and confusion). [Pet. at 14.] Petitioner also cites witness declarations on counsel's behavior at trial. [Id.] Petitioner cites eighteen specific examples of alleged ineffective assistance at trial. [Pet. at 14-21; cited below as claims A:1-18.] These include: making incoherent or rambling statements (A:1,4); showing lack of preparation or

of understanding of the facts of the case (A:2,13,16,17); being unable to form questions and asking the court's assistance (A:3,6); repeatedly apologizing to the court (A:5,7); telling the jury in closing argument that he had a cold and that he "didn't realize this case was so hard" (A:8); failing to object to testimony (A:9-12,18); and failing to properly handle the testimony of witness Aubrey (A:14-15). Petitioner further contends that the trial court declined to pursue evidence concerning defense counsel's health, and disposed of the above issues summarily, relying on the judge's own observations. [Pet. at 21-22.]

B. ERRORS OUTSIDE THE TRIAL RECORD

Petitioner also contends that defense counsel provided ineffective assistance in matters outside the trial record, citing thirteen specific examples: (1) failure to hire an investigator or have investigation done; (2) failure to present evidence implicating Alan Washington; (3) failure to use a weapons expert; (4) failure to investigate the white van seen leaving the crime scene; (5) failure to interview attorney Calkins; (6) failure to prepare petitioner to testify; (7) failure to call Rochelle Washington; (8) failure to investigate or call witnesses to petitioner's good relationship with Burnett; (9) failure to interview or call character witnesses; (10) failures concerning use of the photography expert; (11) failure to interview witness Byrd; (12) failure to interview or call Blanche Washington Butler; and (13) failure to investigate the person who switched places with petitioner in the police line-up. [Pet. at 22-53; cited below as claims B:1-13.] Petitioner also contends that the trial court failed to consider, in the evidentiary proceeding, the expert evidence of attorney Ira Salzman submitted by petitioner

in the form of a declaration.[2] [Pet. at 53-54.]

IV. THE EVIDENTIARY PROCEEDING

Petitioner's claims have been exhausted, and, to varying degrees, addressed by the trial court in the evidentiary proceeding. As noted above, the California Supreme Court ordered further proceedings in the trial court on petitioner's habeas claim. The trial court first allowed each side to make arguments on each of petitioner's claims (inserting preliminary thoughts on some issues along the way). The court then took evidence on certain issues needing further development. Finally, the court made oral findings of fact and conclusions of law.

A. ARGUMENTS ON PETITIONER'S CLAIMS

The court began by discussing petitioner's allegation that defense counsel failed to investigate and present evidence of Alan Washington's previous assaults on and threats to kill his father, Burnett. One disputed point was whether petitioner and Alan Washington looked at all alike. [Pet. Ex. 6 at 138, 143.] The judge made a note to have his clerk find a copy of the photographic "six-pack" from which witness Byrd initially identified petitioner. Because the six-pack included a photograph of Alan, the judge expressed his intention to resolve the factual dispute by comparing the photographs. [Pet. Ex. 6 at 167.]

[2] Petitioner's contention that the trial court did not consider the declaration of attorney-expert Salzman does not state a separate habeas claim, and need not be addressed apart from petitioner's general argument that the trial court erred in its findings. Furthermore, the Salzman declaration is brief (three pages), is mostly devoted to Salzman's qualifications, and, other than the general failure to hire an investigator in a murder case, does not address petitioner's claims specifically. [See Pet. Ex. 5 at 120-122.]

Another disputed point was whether evidence of Alan's assaults on and threats to kill Burnett would have been admissible. The prosecution conceded that eyewitness testimony about the incidents would probably have been admissible, but insisted that court records of convictions would not have been admissible because there was no direct evidence linking Alan to the murder. [Pet. Ex. 6 at 132-142, citing People v. Kaurish, 52 Cal. 3d 648 (1990), cert. denied 502 U.S. 837 (1991); People v. Hall, 41 Cal. 3d 826 (1986).] The court expressed an initial opinion that petitioner's counsel might have been ineffective for not even trying to admit evidence of the convictions. [Pet. Ex. 6 at 140.] The court also expressed its initial opinion that evidence of the previous attacks seemed highly relevant and would probably have been admissible. [Id. at 143-144, 148, 152.]

Another point of contention was counsel's failure to investigate petitioner's alibi. Petitioner alleged that counsel had provided ineffective assistance in failing to uncover and present a Magic Mountain parking ticket, which might have established when petitioner and his cousin arrived at the park. Petitioner had submitted a declaration from Mr. Wyatt, Magic Mountain's Security Supervisor, stating that the police had shown him a parking ticket during the investigation. [Pet. Ex. 6 at 153.] The court agreed to hear testimony from Wyatt and the investigating officers in order to resolve this issue.

The parties also argued over petitioner's allegation that counsel gave ineffective assistance in failing to obtain a weapons expert.

On this issue, the trial court offered an initial opinion that petitioner had not shown prejudice because there was no evidence that a weapons expert would have said anything different from the testimony given. [Pet. Ex. 6 at 156.] In response, petitioner argued that a weapons expert "could have shed some further light and maybe even could have distanced [petitioner] from the murder committed because maybe the ammunition was of a different sort." [Id. at 157.]

The court made more extensive comments on the issue of counsel's alleged errors at trial, stating its agreement with respondent that, in light of the totality of the case, counsel's verbal slip-ups were minor. [Pet. Ex. 6 at 209-210.] The judge stated that, based on his own recollection of counsel's performance, he had no worries about counsel's health. [Id. at 210-211.] He further remembered that counsel was a naturally fast speaker and was perhaps overly apologetic, but that he thought counsel did a commendable job in a difficult case. [Id. at 211-214.] The judge further stated that counsel's objections and conduct at side-bar were appropriate and reasonable. [Id. at 214.] As for the allegation that counsel had repeatedly needed the court's assistance in framing questions, the judge noted that this situation was not uncommon and that counsel's requests for assistance were "totally appropriate," especially after or during heated side-bar arguments. [Pet. Ex. 6 at 215-216.]

B. EVIDENCE PRESENTED

Four witnesses testified at the hearing: Wyatt, Officers Medina and Castillo, and Andres Ameigeiras. As to the Magic Mountain parking ticket,

Wyatt testified that he did not specifically remember being shown a parking ticket, and that, in any event, he was never able to determine when petitioner entered the park. [Pet. Ex. 6 at 239, 241-242.] Officer Medina denied having found a parking ticket related to the case, and testified that the police were not able to determine when petitioner arrived at Magic Mountain.[3] [Pet. Ex. 6 at 264, 271.]

Officer Medina also testified regarding an issue of whether Alan Washington had an alibi. Medina stated that, when he and Officer Castillo interviewed Alan, Alan said he was working as a chef in a hotel on the day and at the time of the murder. Medina further testified that he and Castillo went to the hotel and found that Alan's statement was accurate. [Pet. Ex. 6 at 292-293.] On cross-examination, however, Medina admitted that the name and location of Alan's workplace, and the corroboration of Alan's alibi, were not in the murder book. [Id. at 297.] Officer Medina also testified that he prepared the photographic line-up from which witness Byrd identified petitioner, and that it included a photograph of Alan Washington. [Pet. Ex. 6 at 271-273.] Medina also stated, based on personal contact with both men, that petitioner and Alan did not look alike: Alan was bigger, and had darker skin, less hair, and a rounder face. [Id. at 279-280.]

[3] Evidence presented at the hearing indicated that petitioner and Randall gave the police ticket stubs for entering the park, but that such entry tickets (as opposed to parking tickets) would not have enabled Wyatt to determine a time of arrival.

Officer Castillo testified that Alan had given a statement that he was working at the Milner Hotel on the day and at the time of the murder. [Pet. Ex. 6 at 308-309.] Castillo recalled going to the hotel to verify the alibi and confirming that Alan was working there at the time of the murder. [Id. at 310.] On cross-examination, however, Castillo also admitted that no documentation of Alan's alibi was noted in the murder book. [Id. at 312.]

Petitioner then offered a copy (found in petitioner's trial counsel's files) of the tape of Alan's interview with police, which Castillo later authenticated. [Pet. Ex. 6 at 315-317, 330-332.] Petitioner made an offer of proof that Alan Washington never mentioned working at a hotel, but instead mentioned being at a job center on the morning of the murder. [Id. at 316.] Castillo then testified that he did not check to see if Alan was at the job center at the time of the murder. [Id. at 317.]

Andres Ameigeiras was a case manager at the job center where Alan claimed to be the morning of the murder. [Pet. Ex. 6 at 322.] Alan was one of his clients. [Id.] He did not recall being contacted by police regarding Alan's whereabouts on the day of the murder, and did not recall meeting with Alan on that morning. [Id. at 324, 327.]

Evidence was also presented on petitioner's allegation that counsel was ineffective for failing to offer into evidence a letter from Grambling University showing that petitioner had been admitted in August, 1992 (the month before the murder).[4]

[4] Petitioner found this omission significant because, in closing, the prosecutor argued that this lack of evidence of petitioner's admission helped show that petitioner's whole story was made up. [Ret. Ex. K at 47-48.]

Petitioner had attached a copy of the letter to his state habeas petition. [Ret. Ex. K at 46-48.] However, on further investigation, respondent discovered that the letter was probably fraudulent — at least as to the date of admission — and submitted a declaration to that effect. [Pet. Ex. 6 at 190-192, 340-341.] Petitioner's habeas counsel then conceded that there were sufficient "indicia of unreliability" and offered to withdraw the exhibit. [Pet. Ex. 6 at 343.] However, the trial court refused to allow the withdrawal. [Id.]

Petitioner's trial counsel did not testify at the hearing. He submitted a short declaration stating only that he was petitioner's counsel, he was on medication during the trial, and he had stopped practicing law afterwards based on the advice of his doctor. [Pet. Ex. 2.] The declaration did not address any of petitioner's specific allegations. In the evidentiary proceeding, there was considerable discussion about whether counsel's medical records would be reviewed or whether the doctor would testify. However, the trial court ruled that the records were privileged and the doctor was not called. [Pet. Ex. 6 at 344.]

C. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After hearing arguments and evidence, the trial court went through the petition point-by-point, making oral findings and conclusions along the way. On the issue of the alleged incoherent, "off-base," or rambling statements, the court found that petitioner had not proven counsel was ineffective.

Relying in part on his previously stated opinion, the judge concluded that petitioner's allegations were either based on quotes taken out of context or were simply incorrect. [Pet. Ex. 6 at 364.]

On counsel's alleged lack of preparation and misunderstanding of facts, the court found that the specific instances pointed to by petitioner were not prejudicial. [Pet. Ex. 6 at 364, 368-370.] Particularly with regard to counsel's alleged errors involving the photography expert, the court found no proof of ineffective assistance because there was no showing of prejudice. [Id. at 368-370.]

On counsel's alleged inability to form certain questions for witnesses, requiring the court's assistance, the court found that there was no proof that counsel had acted deficiently. [Pet. Ex. 6 at 365-366.] As for counsel's repeated apologies, the court found that these were probably due to counsel's habit of rapid speech and were meaningless in the context of the whole case. [Id. at 366-367.] On counsel's statement to the jury about his health problems and his surprise at the case's complexity, the court found that the statements had no significance, either alone or in the context of the trial. [Id. at 367.]

On counsel's alleged failure to object to testimony and/or to cross-examine prosecution witnesses, the court found that the petitioner's examples either did not show deficiency or were not prejudicial. [Pet. Ex. 6 at 367-368.] On the issue of treating a lay witness as a weapons expert, the court found no prejudice. [Id. at 368-369.]

The trial court made no overall finding on petitioner's general claim

that counsel failed to hire an investigator or do investigations, instead addressing specific claims as to what investigation might have uncovered. [Id. at 370.]

On the claim that counsel failed to investigate and present evidence of Alan Washington's possible culpability, the court first commented that evidence of Alan's previous assaults upon his father might not have been admissible without evidence linking Alan directly to the crime at issue. [Pet. Ex. 6 at 371.] However, the court found that, even if the evidence would have been admissible, and even if counsel did fail to investigate, this was not prejudicial because: (a) petitioner and Alan did not bear a "great resemblance"; (b) Alan's photograph was in the six-pack from which Byrd identified petitioner; (c) Alan "may very well have had an alibi"; and (d) Byrd was a very persuasive, credible witness. [Id. at 371-375.]

On counsel's failure to present testimony from people who saw petitioner and Burnett working together peacefully after the alleged death threats, the court found that this omission was reasonable because petitioner had admitted problems between himself and his uncle, and evidence of a peaceable relationship after the threats "begs the issue" of whether there was any physical confrontation between the two. [Pet. Ex. 6 at 375-376.]

The court found that respondent had disproved the claim that counsel failed to investigate and present the parking ticket as alibi evidence, because there was no such ticket. [Pet. Ex. 6 at 376-377.]

On the issues of failure to obtain a weapons expert or to investigate the van, the court found that neither was "a basis to believe legal incompetence." [Pet. Ex. 6 at 378, 380.] As for the failure to interview the attorney who handled the victim's estate, the court found that this did not show ineffectiveness, especially since the jury was told that petitioner was not a beneficiary of the estate. [Id. at 378-379.] On the claim of failure to prepare petitioner to testify, the court found that petitioner had not proven there was anything counsel could have done to improve his testimony. [Id. at 379-380.] As for the failure to present the testimony of several family members, the court found that there was no reason to believe counsel was ineffective, because submission of the forged Grambling letter by family members made their credibility suspect.[5] [Id. at 380-384.]

On claims that counsel failed to use an eyewitness identification expert or make good use of the photography expert, the court relied on previous comments to find neither deficient performance nor prejudice. [Pet. Ex. 6 at 384.] As for failure to interview or investigate witness Byrd, the court found that petitioner failed to show it would have made any difference. [Id.] On the failure to investigate the person who switched places with petitioner in the line-up, the court found no showing of prejudice. [Id. at 385.]

Overall, the court concluded, some "important issues that may have influenced the Supreme Court" to order further proceedings had

[5] Petitioner's habeas counsel stated that the letter came from a family member. [Id. at 383.]

proved to be untrue: the parking ticket, the Grambling letter, and counsel's conduct during the trial.[6] With regard to the other issues, the court concluded that petitioner failed to show that he was prejudiced by any errors counsel made. The court concluded that the trial was fundamentally fair and that "the correct outcome was achieved by the jury." [Pet. Ex. 6 at 385.]

V. STANDARD OF REVIEW

In reviewing this petition, the court is limited to deciding whether petitioner was convicted in violation of the Constitution, laws, or treaties of the United States. See 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 68, 112 S. Ct. 475, 116 L.Ed.2d 385 (1991). Federal habeas relief is not available for error in interpreting or applying state law. Estelle, 502 U.S. at 67-68; Bonin v. Calderon, 77 F.3d 1155, 1161 (9th Cir. 1996)(no federal habeas relief for state law error not amounting to denial of federal constitutional right).

The petition was filed after April 24, 1996, and is reviewed under provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Lindh v. Murphy, 521 U.S. 320, 326-327, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). The standard of habeas review under AEDPA is set forth at 28 U.S.C. § 2254(d)-(e).

Under AEDPA, federal habeas courts must presume correct any state court factual determinations not rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

[6] Petitioner appears now to have abandoned the claims regarding the parking ticket and the Grambling letter.

Furthermore, AEDPA placed "a new constraint" on federal habeas courts reviewing claims which have been adjudicated on the merits in state court. Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A federal court may not grant relief on any claim, adjudicated on its merits in state court, unless the adjudication resulted in a decision that was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Under AEDPA, "clearly established Federal law" means the holdings (not dicta) of the Supreme Court (not circuit courts). Van Tran v. Lindsey, 212 F.3d 1143, 1154 (9th Cir.), cert. denied, 121 S. Ct. 340 (2000)(applying Williams). Circuit law may still clarify what Supreme Court law is "clearly established" or whether a state court decision is an "unreasonable application" of that law. Id.

The Williams Court explained the "contrary to" and "unreasonable application" clauses of § 2254(d)(1). Under the "contrary to" clause:

> a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts.

Williams, 529 U.S. at 412-413. Thus, a state court decision is "contrary" if it either (a) "fails to apply the correct controlling authority," or (b) applies

the correct authority, to facts "materially indistinguishable" from those in the controlling case, but reaches a different result. Anthony v. Cambra, 236 F.3d 568, 578 (9th Cir. 2000), cert. denied, 121 S. Ct. 1576 (2001).

Under the "unreasonable application" clause:

> a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 413. Thus, a state court decision is an "unreasonable application" if it either (a) "correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable," or (b) "extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." Anthony, 236 F.3d at 578.[7]

In applying § 2254(d)(1) a federal habeas court first determines whether the state court decision was erroneous, and then whether it was contrary to or an unreasonable application of controlling law. Van Tran, 212 F.3d at 1155, citing, e.g., Weeks v. Angelone, 528 U.S. 225, 120 S. Ct. 727, 154 L. Ed. 2d 727 (2000). Under Williams, a state court application of federal law may be reversed as unreasonable only if it is "objectively unreasonable."

[7] The two clauses can overlap, and it may be difficult to decide, e.g., whether a particular decision "unreasonably extended a rule to a new context or simply contradicted controlling authority." Van Tran, 212 F.3d at 1150.

Delgado v. Lewis, 223 F.3d 976, 980-981 (9th Cir. 2000) (decision after remand, applying Williams and Van Tran). Here "objectively unreasonable" is equivalent to "clearly erroneous." Delgado, 223 F.3d at 981; Van Tran, 212 F.3d at 1153-54. "Absent clear error," the deference owed to state court decisions "dictates a denial of habeas relief" even if legal error has been committed. Delgado, 223 F.3d at 981.

When a state court decision articulates a rationale for its conclusion, a reviewing court may straightforwardly apply the Williams analysis. When, as here, the California Supreme Court has summarily denied a claim, without giving a rationale, the decision is presumed to rest on grounds articulated by a lower court. Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); Hunter v. Aispuro, 982 F.2d 344, 348 (9th Cir. 1992). A reviewing court must then "look through" the summary denial and apply the deferential AEDPA standard to the underlying decision.

VI. DISCUSSION

This court must "look through" the California Supreme Court's summary denial of petitioner's final state petition, to the reasons articulated by the trial court for denial of the petition in the evidentiary proceeding. In that proceeding, the court correctly identified the controlling "clearly established Federal law" as the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d. 674 (1984). See Wilson v. Henry, 185 F.3d 986 (9th Cir. 1999). Therefore, the question before this court is whether the trial court's findings and conclusions were

erroneous under Strickland, and, if so, whether they were "clearly erroneous."

A. THE STRICKLAND STANDARD

To prove constitutionally ineffective assistance of trial counsel, a petitioner must show both that counsel's performance was deficient, and that this prejudiced the defense. Strickland, 466 U.S. at 668, 687-94; Jones v. Wood, 207 F.3d 557, 562 (9th Cir. 2000); Johnson v. Baldwin, 114 F.3d 835, 837-38 (9th Cir. 1997). The reviewing court must reject a claim of ineffective assistance on finding either that counsel's performance was reasonable, or that the alleged error was not prejudicial. Strickland, 466 U.S. at 697. Both the "reasonableness" (or "competence") prong and the "prejudice" prong of a Strickland analysis are mixed questions of fact and law. Strickland, 466 U.S. at 698; see also Kimmelman v. Morrison, 477 U.S. 365, 388-89, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

To prove deficiency, a petitioner must show that counsel's performance fell "below an objective standard of reasonableness" or "outside the wide range of professionally competent assistance." Turner v. Duncan, 158 F.3d 449, 456 (9th Cir. 1997), citing Strickland, 466 U.S. at 668, 688, 690. The reviewing court must examine the reasonableness of counsel's performance under all the circumstances, including the facts of the particular case as viewed at the time of the conduct in question. Strickland, 466 U.S. at 688, 690. Scrutiny of counsel's performance must be "highly deferential," and a petitioner must overcome the specific presumption that,

under the circumstances, the challenged action "might be considered sound trial strategy," and the general presumption that counsel's performance was reasonable. Id., at 689-690.

To prove prejudice, it is not enough to show that counsel's errors had some conceivable effect on the outcome. Strickland, 466 U.S. at 693. Rather, a petitioner has the burden of showing that, considering the totality of the evidence, there is a reasonable probability, sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694-695. Unsupported speculation and conclusory allegations are not sufficient to show either unreasonable performance or prejudice. Jackson v. Calderon, 211 F.3d 1148, 1155 (9th Cir. 2000). In regard to prejudice, especially, this court should also consider any cumulative effect of errors which may not be sufficiently prejudicial when considered in isolation.

B. CLAIMS OUTSIDE THE TRIAL RECORD

Petitioner states thirteen claims of ineffective assistance outside the trial record, i.e., a general failure to investigate, and specific failures to investigate or present additional evidence.

1. General Failure to Investigate

The record shows that petitioner's trial counsel failed to hire an investigator, and failed to pursue certain avenues of investigation (e.g. Alan Washington's alibi). [Pet. at 23-24 (Claim B:1); Tra. at 14-16.] The overarching goal in any Strickland inquiry is protecting the integrity of the adversarial process. Strickland, 466 U.S. at 686 ("The benchmark for

judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.") That process cannot function correctly unless the defense does a proper investigation. See Kimmelman, 477 U.S. at 384. Therefore, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691; see also Turner, 158 F.3d at 456. On the other hand, the duty to investigate "is not limitless: it does not require that every conceivable witness be interviewed." Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001) (amended, 253 F.3d 1150 (2001)), citing Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995), cert. denied, 517 U.S. 1111 (1996). Accordingly, the bare fact of counsel's general failure to investigate does not, by itself, establish either incompetence or prejudice under Strickland.

By its nature, a Strickland inquiry is highly fact-specific, and this is particularly true in a case of alleged failure to investigate. In determining whether counsel's failures to investigate in petitioner's case were either unreasonable or prejudicial, this court (as the trial court did) should first address specific issues that counsel either did not investigate, or (despite available information) did not present at trial, then consider whether any specific errors were prejudicial, and then, finally, determine whether any errors by counsel had a cumulative prejudicial effect.

2. Third-Party Culpability

Petitioner's strongest claim is that he was denied effective assistance when his trial counsel failed to investigate and present evidence concerning petitioner's cousin, Alan Washington. [Pet. at 25-32 (Claim B:2); Tra. at 16-20.] It is clear that counsel knew, from several sources, that Alan had severely beaten his father, Burnett, on two occasions, each resulting in hospitalization for Burnett, and an assault conviction for Alan. Witness statements also indicated that, while incarcerated, Alan had threatened to kill Burnett (and Alan's siblings, Randall and Rochelle) after he was released from prison. (Alan was released some nine months before Burnett's murder.) Furthermore, as discussed above, petitioner demonstrated at the evidentiary hearing that counsel had a copy of the audio tape of Alan's interview with the police. If counsel had listened to the tape, he would have known what Alan's claimed alibi was. If he had investigated further, he could have discredited the alibi or, at least, raised doubt it. [See CT at 35-36 (preliminary hearing testimony of Eric Storey); Pet. Ex. 2 at 9-12 (declarations of Blanche Washington Butler and Anita Washington Murphy); Pet. Ex. 2 at 27 (police report of Rochelle Washington's statement); See Pet. Ex. 2 at 13-26 (records of Alan's convictions, including Burnett's own testimony about the beatings and death threat); Pet. at 25-27.]

The prosecution presented testimony that petitioner had threatened to kill Burnett as evidence tending to prove that petitioner killed Burnett. Here trial counsel had evidence that Alan had not only threatened to kill Burnett, but had twice assaulted him.

Such evidence could have mitigated the damaging effect of the evidence of petitioner's threat. However, it appears that counsel did not fully investigate this evidence, and it is evident that hedid not present it at trial.

a. The "Competence" Prong

Numerous decisions have held that failure to investigate and uncover facts that could have contributed to a viable third party culpability defense amounted to deficient performance if there was no apparent strategic justification. See, e.g., Jones v. Wood, 114 F.3d 1002, 1010-11 (9th Cir. 1997); Sanders v. Ratelle, 21 F.3d 1446, 1456-60 (9th Cir. 1994). Here, counsel either failed to investigate or failed to use evidence for a possible third party culpability defense.

Given counsel's failure to testify at the evidentiary hearing or to respond in detail in his declaration, any conclusions about his reasons for not investigating or presenting this evidence must, necessarily, be speculative. However, there is no evident reason for counsel not to investigate such evidence and at least try to have it admitted. Although the state courts did not decide whether this "third-party" evidence would have been admissible, it is, at least, arguable that it would have been.[8]

[8] See People v. Hall, 41 Cal. 3d 826, 833-34, 718 P.2d 99, 226 Cal. Rptr. 112 (1986)(to be admitted, such evidence need not show "substantial proof of a probability" that a third party committed the crime, but need only be "capable of raising a reasonable doubt" of the defendant's guilt). The evidence may not be merely speculative (e.g. re: motive or opportunity), but should be treated like any other evidence: admissible if relevant and not outweighed by risk of undue delay, prejudice, or confusion. Hall, 41 Cal. 3d at 833; see also Spivey v. Rocha, 194 F.3d 971, 978 (9th Cir. 1999)(discussing Hall).

A third-party culpability defense would have supplemented, rather than contradicted, petitioner's alibi defense, and would have enabled counsel to argue that Alan, like petitioner, had threatened Burnett, and that Alan did not have a supported alibi. The record does not indicate how presenting "third-party" evidence could have harmed the defense, or what strategic motive counsel could have had for not investigating and seeking to present this evidence.[9]

Accordingly, it appears that counsel's failure to investigate and proffer evidence of third-party culpability was unreasonable under Strickland. However, the trial court did not make an explicit "reasonableness" finding on this particular claim, and, therefore, this court cannot identify either error or a basis for AEDPA deference here. Instead, the trial court decided this claim on the "prejudice" prong of Strickland, and it is that particular decision which this court must review under the AEDPA standard.

[9] As noted above, at side-bar the prosecutor said that, if petitioner's counsel asked witness Fotenette whether anyone else (e.g. Alan) had threatened to kill Burnett, the prosecutor intended to inquire into other things Burnett had told Fotenette, some of which would be damaging to petitioner. Petitioner's counsel said that he was not going to ask Fotenette about other threats on Burnett's life, because it would be "improper" and would "open the door" for the prosecution. It is not clear what this might have "opened the door" to. However, even if counsel had some tactical reason for not asking Fotenette about Alan, there is no indication of a tactical reason for not trying to present this evidence through another source, or, at the very least, for not fully investigating it.

b. The "Prejudice" Prong

Several Ninth Circuit decisions have found prejudice in trial counsel's failure to investigate and present evidence of third-party culpability. See, e.g., Sanders, 21 F.3d at 1456, 1461 (prejudice when counsel did not investigate petitioner's brother who confessed to others and was identified by three of five eyewitnesses); cf. Johnson, 114 F.3d at 839-40 (prejudice when counsel failed to investigate petitioner's alibi and petitioner testified denying presence at scene); but see Wilson v. Henry, 185 F.3d 986, 989 (9th Cir. 1999)(no prejudice in failure to investigate when no showing that investigation would have supported defendant's testimony); see also three cases petitioner submitted as recent case authority: Jones, 207 F.3d at 563 (prejudice in failure to investigate third party defense); Brown, 137 F.3d at 1157-58 (prejudice in failure to investigate alibi defense); and Turner, 158 F.3d at 458 (remanding for evidentiary hearing re: prejudice in failure to investigate "psychiatric" evidence).[10]

Here, the two strongest pieces of evidence against petitioner were Byrd's eyewitness testimony placing him in a van leaving the scene, and Fotenette's testimony about petitioner's death threat against Burnett. Petitioner's alibi defense had little support. Fotenette's testimony as to the death threat could have been weakened by evidence that Alan had also threatened to kill Burnett and had actually severely beaten him on two previous occasions.

[10] It should be noted that Sanders, Johnson, Brown, Turner, and Jones were pre-AEDPA petitions, while Wilson was post-AEDPA.

There was also evidence that Alan had, if anything, an even weaker alibi than petitioner. Although Byrd, who was shown photographs of both petitioner and Alan, identified petitioner as the driver of the van, Byrd only got a glimpse of the driver from a considerable distance, and the weight of his testimony might have been reduced if the evidence pointing to Alan had been admitted. On the other hand, other significant evidence pointed to petitioner, and not to Alan, such as petitioner's flight from the police, and the evidence linking him to shotguns. Accordingly, the prejudice question is a close one.

c. AEDPA Deference

If this were a case subject to de novo review, this court might well find that counsel's failure to investigate and present evidence of Alan's possible culpability was reasonably likely to have affected the jury's verdict, and was, thus, sufficient to undermine confidence in the outcome of petitioner's trial. However, under the deferential AEDPA standard, this court may not simply decide the prejudice issue for itself. Instead, to grant habeas relief, this court would have to find that the state court's decision was "clearly erroneous" or "objectively unreasonable" under Strickland. See Delgado, 223 F.3d at 980-81; Van Tran, 212 F.3d at 1153-54.

As noted above, the trial court found that any failure to investigate Alan was not prejudicial because: (a) petitioner and Alan did not bear a "great resemblance"; (b) Alan's picture was also in the six-pack from which Byrd identified petitioner; (c) Alan "may well have had an alibi"; and (d) Byrd was a very persuasive, credible witness.

Point (c) is purely speculative, and does not support the trial court's prejudice decision.

The other three points, however, express the trial court's reasoned conclusion that it is not reasonably likely that admission of evidence pointing to Alan as a possible killer would have overcome the weight of Byrd's eyewitness testimony identifying petitioner. In drawing this conclusion, the trial court seems to have given particular weight (i) to its finding that there was no evidence showing that petitioner and Alan closely resembled each other; and (ii) to its determination that petitioner's threat against Burnett was recent, but Alan's first opportunity to act on his prior threats was relatively quite remote.[11]

Considering, in particular, the trial court's opportunity to judge for itself the weight and credibility of Byrd's testimony at trial and its likely effect on the jury, this court does not have a basis for finding that the trial court's conclusion was "clearly erroneous" or "objectively unreasonable" under Strickland. See Van Tran, 212 F.3d at 1159. Therefore, this court must defer, under AEDPA, to the trial court's decision that petitioner was not prejudiced, and should deny habeas relief on this claim.

3. Other Failures to Investigate

Petitioner also claims ineffective assistance based on trial counsel's failure to investigate the white van seen leaving the crime scene, the person who switched places with petitioner in the police line-up, and the eyewitness, Byrd. With respect to each of these claims, petitioner has

[11] Petitioner allegedly threatened to kill Burnett some two months before the killing, while Alan was released from prison some nine months before the killing.

neither established a Strickland violation, not shown that the trial court's decision was clearly erroneous.

For example, except for Byrd's eyewitness testimony, the prosecution presented no evidence at trial linking petitioner to the van, and there is no indication that trial counsel made any investigation into the van. [Pet. at 34 (Claim B:4); Tra. at 21-22.] Petitioner speculates that investigation of the van might have identified it with someone other than petitioner. [Id.] However, unsupported speculation does not suffice to show either unreasonable performance or prejudice. Jackson, 211 F.3d at 1155.

The only evidence in the record connecting someone else to the van is the statement by petitioner's cousin, Eric Storey, that he thought Randall owned a white van at some point. [See Ret. Ex. U.] Storey also stated that Randall and petitioner were drug users who were involved in insurance fraud. [Id.] It was not unreasonable for trial counsel to hesitate before opening the door to this type of evidence. Moreover, even if it was unreasonable for counsel not to do some investigation of the van, petitioner's speculation does not establish prejudice under Strickland. Accordingly, the trial court's rejection of this claim was not clearly erroneous under AEDPA.

It also appears that counsel did nothing to investigate petitioner's explanation that another man intimidated him into switching places at the police line-up. [Pet. at 53-54 (Claim B:13); Tra. at 32-33.] However, petitioner has not presented any evidence of the man's identity, whether he could have been located, or whether he would have corroborated petitioner's story. If trial counsel had investigated, it might have been

possible to identify the man, and he might have confirmed petitioner's story. He might just as well have contradicted petitioner's story. Here, again, such unsupported speculation cannot establish prejudice under Strickland, even if the failure to investigate was unreasonable. Accordingly, the trial court's rejection of this claim was not clearly erroneous under AEDPA.

Apparently counsel made no effort to interview or investigate the eyewitness, Byrd, prior to trial, and there was no evident tactical reason for this omission. [Pet. at 50-51 (Claim B:11); Tra. at 29-31.] Byrd was probably the most important prosecution witness. Certainly, if investigation of Byrd had revealed a drug, visual, or psychological problem, this would have strengthened petitioner's case. However, other than speculating about drug problems being endemic in the music business, petitioner has made no showing that Byrd suffered any such problems, or that further investigation would have disclosed any such problems. Once again, speculation cannot establish prejudice under Strickland, or show that the trial court's decision was clearly erroneous under AEDPA.

4. Failures Re: Expert Witnesses

The evidence shows that trial counsel did not use a weapons expert. [Pet. at 32-34 (Claim B:3); Tra. at 19-20.] Petitioner speculates that a weapons expert might have been called to compare the shells found at the scene with those found at petitioner's home, to compare the shells found at the scene with the type of weapon able to fire them, to establish the rate at which the weapon could have been fired, and to discuss the distance between shooter and victim. [Id.] However, execpt for the

first point, none of this was relevant to petitioner's defense at trial. The weapon used was not at issue; petitioner's presence at the scene was. The prosecution did not produce evidence linking the shells found at petitioner's house specifically to the murder weapon. Rather, the prosecution produced several items of evidence linking petitioner to shotguns generally.

Again, even if trial counsel's failure to use a weapons expert was unreasonable, petitioner has not demonstrated Strickland prejudice by simply speculating on favorable conclusions a weapons expert might have drawn from the evidence. Here too it is just as likely that any expert counsel called would have underscored the possibility that shells found in petitioner's home matched those found at the scene. Accordingly, petitioner has not shown that the trial court's rejection of this claim was clearly erroneous.

Petitioner is on stronger ground with his claim that trial counsel should have used an eyewitness identification expert. [Pet. at 45-49 (Claim B:10); Tra. at 28-29.] As noted above, the testimony of eyewitness Byrd was the strongest evidence against petitioner, and it was essential for the defense to cast doubt on the reliability of the identification of petitioner as the driver of the van. The record establishes that petitioner's relatives talked with trial counsel about getting an eyewitness identification expert, and there is no evident tactical reason for counsel's failure to, at the very least, consult with such an expert. Here, too, it appears that petitioner can meet his burden under the "reasonableness" prong of Strickland.

Furthermore, petitioner claims that trial counsel did not adequately prepare the photographic expert he did call, and failed to lay an adequate foundation for admitting some of the proffered photographs (including a van with a driver at the crime scene). Although it is not clear whether these photographs would have been admissible even with a better foundation, it is clear that counsel could have made a better effort to get them admitted, and could have better prepared his expert with regard to both the taking of the photographs and the testimony offered. Given that counsel proffered these photographs, he clearly had no tactical reason for failing to lay a foundation for their admission or to better prepare his expert. Here, too, petitioner meets the "reasonableness" prong of Strickland.

However, once again, the trial court decided these claims, at least in part, on prejudice. Petitioner did not present the evidence of an eyewitness identification expert in the state evidentiary hearing, and has not otherwise made a showing of prejudice sufficient to enable this court to find that the trial court's decision on this issue was clearly erroneous.[12] See Wildman v. Johnson, 261 F.3d 832, 834 (9th Cir. 2001)(mere speculation about what an expert might have said does not establish Strickland prejudice).

Similarly, petitioner has not shown that the failure to gain admission of the additional photographs, or other failures in preparing the photographic expert, were so clearly prejudicial as to make the trial court's

[12] There is no discussion of failure to use experts generally, or an eyewitness identification expert specifically, in the Salzman declaration. [Pet. Ex. 5 at 120-122.]

decision clearly erroneous. Counsel was able to present photographs of the crime scene (without van or driver) which could correct the impression given by the prosecution's not-to-scale diagram, and which could impress on the jury the distanceinvolved. Counsel was also able to argue from evidence that other eyewitnesses could not identify the driver, and that Byrd only saw him for a brief time. Even if counsel had been able to supplement this with generic expert testimony about the limitations of eyewitness identifications, petitioner has not shown a reasonable probability that this would have altered the outcome.

5. Failure to Interview or Call Additional Witnesses

Petitioner also contends that he was denied effective assistance by trial counsel's failure to call, or at least interview, a number of additional witnesses, including: the probate attorney Calkins, Blanche Washington Butler, Rochelle Washington, witnesses to petitioner's good relationship with Burnett, and possible character witnesses.

Kenneth Calkins was the attorney handling Burnett Washington's estate. [RT at 499, 507; Pet. at 35-37 (Claim B:5), Tra. at 22-23.] At trial, Calkins testified that neither petitioner nor Randall were beneficiaries of Burnett's estate, that Rochelle Washington was the only heir under Burnett's will, and that Randall Washington was entitled to some money on an insurance policy (but did not know about this before Burnett's death). [RT at 508-509.]

Calkins also contradicted petitioner's testimony on one point. As noted above, Officers Medina and Hooks testified that petitioner had refused to allow them to take a profile photograph, claiming that he was

following the advice of his attorney. [RT at 112-113, 283, 441-443.] At trial, petitioner testified that he declined to provide a photograph to the two officers on the advice of his attorney, Calkins. [RT at 388-390.] On rebuttal, Calkins was asked whether he advised petitioner. [RT at 500.] There followed a side-bar discussion on possible attorney-client privilege, and the judge ruled that petitioner had waived the privilege on this issue. [RT at 501-504.] Calkins then testified that he did not advise petitioner not to provide the photograph, and would not have done so. [RT at 504-506.]

The record supports petitioner's contention that trial counsel did not interview Calkins before trial. There was no evident tactical consideration for not, at least, interviewing Calkins. However, petitioner has not specifically shown why, prior to trial, counsel should have known that he ought to interview Calkins.

In any event, petitioner has not shown that counsel's failure to interview Calkins resulted in Strickland prejudice. First, the evidence that neither petitioner nor Randall stood to inherit from Burnett's estate was, if anything, beneficial to the defense. On the other hand, the testimony of the two officers put into evidence petitioner's claim that he refused to provide the photograph on the advice of counsel. Once he decided to testify, he faced being questioned about this. Once petitioner confirmed that he told the police he acted on advice of counsel and that Calkins did so advise him, he faced the possibility that Calkins would be called to testify. If Calkins had confirmed his story, this would have supported petitioner's credibility on a minor point.

If counsel had known what Calkins would say, petitioner might have changed his story in testifying, but this could have also weakened his credibility. The fact that Calkins testified and contradicted petitioner was damaging to the defense. However, in light of the totality of the evidence (including evidence of his flight attempt, and his attempt to switch places in the line-up), petitioner has not shown a reasonable probability that, but for counsel's failure to interview Calkins, the outcome at trial would have been different. Strickland, 466 U.S. at 694.

Petitioner also contends that counsel was ineffective in failing to call Rochelle Washington, petitioner's cousin and Burnett's daughter. [Pet. at 39-40 (Claim B:7); Ret. at 45-48; Tra. at 25-26.] Petitioner contends that Rochelle could have confirmed that she informed petitioner and Randall about the murder when she called Randall at Magic Mountain, and could have testified that she was the only beneficiary of Burnett's will and that Alan had threatened Burnett, Randall, and Rochelle. However, the crucial issue in the Magic Mountain alibi was when petitioner arrived there, and Rochelle's testimony could not confirm that. Furthermore, Rochelle's statements to the police (which could have been used to impeach her if she had testified otherwise at trial) indicated, inter alia, that she thought Randall was planning to go to Magic Mountain with someone else, and that the family expected both her and Randall stood to benefit from Burnett's death. [Ret. at 46-47.] Accordingly, since Rochelle's testimony might equally well have been damaging to the defense, petitioner has not established that counsel's failure to call her was ineffective

assistance on either prong of Strickland.[13]

Again, petitioner claims that counsel was ineffective in failing to interview or call Blanche Washington Butler, administrator of the estate of petitioner's grandfather (of which petitioner was an heir). [Pet. at 51-52 (Claim B:12); Ret. at 55-56; Tra. at 31-32.] Petitioner contends that Blanche's testimony could have shown that petitioner did not have an economic motive to kill Burnett, and that, on the contrary, Burnett's death was against petitioner's economic interest. However, trial counsel was able to establish clearly that petitioner did not directly benefit economically from Burnett's death, in that he was not a beneficiary. On the other hand, the record contains conflicting and unclear evidence as to whether Burnett's death could have, indirectly, been to petitioner's economic benefit or detriment. If counsel had introduced more testimony addressing possible indirect benefit to petitioner, the result might well have been to strengthen, rather than weaken, the prosecution's suggestion that petitioner might have been motivated by the expectation that Burnett's death would benefit Randall and that petitioner might share in that. In any event, petitioner has not established, in particular, that counsel's failure to call Blanche to testify was ineffective assistance under either prong of Strickland.

[13] For the possibility that Rochelle could have confirmed the death threats by Alan, see the discussion, above, on the third-party culpability defense, prejudice, and AEDPA deference to the trial court's decision. Failure to use Rochelle's testimony on the death threats does not clearly tip the balance and show that the trial court's prejudice determination was clearly erroneous.

Petitioner also contends that counsel was ineffective in failing to investigate or call witnesses to petitioner's good relationship with Burnett after the alleged death threat, and in failing to present character witnesses. [Pet. at 41-44 (Claims B:8-9); Ret. at 48-53; Tra. at 27-28.] However, some of the potential witnesses also made statements to the police damaging to petitioner, such as statements on his propensity to violence and involvement in drugs and other illegal activities. Introducing evidence of petitioner's good character would have opened the door to the prosecution's introduction of (apparently abundant) evidence of petitioner's bad character. Furthermore, such testimony by family members could have been impeached for bias. Finally, petitioner has not cited specific and admissible evidence showing that relations between petitioner and Burnett after the alleged death threat were so good as to make it reasonably likely the jury would have concluded either that petitioner did not threaten Burnett or that any "bad blood" had been overcome.

Petitioner's claims regarding failure to call further witnesses do not establish ineffective assistance of counsel under Strickland, either in themselves, or as cumulative to petitioner's strongest claims (failure to pursue a third party culpability defense or to use an eyewitness identification expert). Accordingly, the trial court's decision rejecting these claims was not clearly erroneous.

6. Failure to Prepare Petitioner to Testify

Petitioner's final outside-the-record claim of ineffective assistance is that counsel failed reasonably to prepare petitioner to testify. [Pet. at 37-39 (Claim B:6); Ret. at 43-44; Tra. at 23-25.] Petitioner makes a strong

case that trial counsel did not prepare petitioner for his testimony, and that there was no evident tactical reason for such an omission. However, here again, petitioner has simply not demonstrated Strickland prejudice. Except for the issue of the contradiction between petitioner and attorney Calkins, discussed above, petitioner has not identified any specific instances in which he might have testified differently had he been properly prepared. The general and conclusory allegation that petitioner's testimony did serious damage to his case is not sufficient to establish prejudice under Strickland. Instead, petitioner must that specific prejudice resulted from the unreasonable conduct of counsel. He has not done so, and, thus, has not established that the trial court clearly erred in rejecting this claim.

C. CLAIMS BASED ON THE TRIAL RECORD

Petitioner also raises eighteen examples of alleged ineffective assistance of counsel represented in the trial record. [Pet. at 14-21, Claims A:1-18.] Petitioner attributes counsel's allegedly incompetent actions to either illness or the effects of medication, and argues that the trial court erred in not pursuing evidence of counsel's health, and in relying on the trial judge's own conclusions based on having observed the trial. The trial court decided these specific claims on both the competence and prejudice prongs of Strickland. Petitioner was not shown that the trial court's decision rejecting these claims was clearly erroneous.

As noted above, the trial court rejected petitioner's claim that trial counsel made incoherent or rambling statements (Claims A:1,4), finding that the allegations were either simply incorrect or were based on passages

taken out of context. Petitioner has not shown why this court should not defer to the trial court's finding under 28 U.S.C. 2254(d)(1)-(2) and (e)(1).

The trial court also reasonably found that petitioner was not denied effective assistance by counsel's alleged inability to form questions and need to ask the court's assistance (Claims A:3,6). Instead, as the court noted, the side-bar conferences in question show counsel's grasp of the facts and zealous representation. [RT at 215-20, 233-40.] Considering the strength of the prosecution objections in each instance, perhaps the best thing counsel could have done was ask the court's assistance in forming questions. Similarly, the trial court reasonably found no Strickland error based on counsel's apologies to the court (Claims A:5,7), which the trial court concluded were for talking too fast and slurring his words, and reasonably found no prejudice in counsel's statements, during closing argument, that he had a cold and that he "didn't realize this case was so hard" (Claim A:8). Petitioner has not shown what effect these statements were likely to have had on the jury's verdict.

The trial court reasonably concluded that petitioner was not prejudiced by any of counsel's actions which petitioner alleges show lack of preparation or lack of understanding of the facts of the case (Claims A:2,13,16,17). For example, counsel's question to Officer Medina regarding whether he had asked petitioner to take a lie detector test was stricken from the record, and petitioner has not shown how the question might have affected the outcome. [RT at 147-48.] The claim that counsel was ineffective in asking Officer Medina whether he had a specific picture without

first obtaining the picture himself fails because counsel told the court he did have the picture. [RT at 130.] The fact that counsel failed to use the picture in question does not support an ineffectiveness claim because petitioner has not shown how this affected the outcome of the trial. Similarly, petitioner's claim that counsel asked Fotenette about checks she wrote on Burnett's account without having copies of the checks does not support an ineffectiveness claim. Fotenette was eventually confronted with the checks in question on re-direct and re-cross-examination. [RT at 243-46.] In any case, petitioner has not shown what effect this testimony could have had in the larger scheme of things. Petitioner's claim that counsel failed to bring the murder book to court does not show ineffective assistance either. As respondent argues, the one time counsel actually needed documents from the murder book he was able to obtain them from the prosecution. Thus, petitioner has not shown prejudice from the alleged failure.

As for petitioner's claims based on counsel's alleged failure to object to testimony or to properly cross-examine (Claims A:9-12,18), the trial court reasonably concluded either that counsel was not deficient or that petitioner was not prejudiced. Review of the record supports the trial court's conclusions regarding the specific testimony at issue. Thus, petitioner's argument that counsel should have objected to Detective Goloskie's testimony regarding the mode of entry into the shop where Burnett was killed [RT at 51] fails because petitioner has not shown that this issue was in dispute or that an objection would have changed anything.

Petitioner's argument that counsel should have objected to testimony and/or cross-examined the Deputy Coroner [Id. at 66, 70, 76] fails because petitioner has not shown a valid ground for objection or that issues the coroner testified about were in dispute. Similarly, petitioner's argument that counsel should have objected to prosecution questioning of Mr. Byrd on the type of gun used in the shooting [RT at 252-53] fails because, as respondent notes, there was no issue about the type of weapon used.

Petitioner also contends that trial counsel made errors regarding the testimony of witness Aubrey (Claims A:14-15). First, petitioner argues that counsel should have exploited Aubrey's testimony on petitioner's fear of people in the neighborhood. However, as respondent notes, this testimony had to do with Aubrey seeing petitioner with a sawed-off shotgun and petitioner explaining that he was going to get even with some people. [RT at 165.] This is not the type of testimony a reasonable defense attorney would want to remind the jury of. Moreover, even if petitioner had tried to use this explanation to justify his flight from the police, he does not show a reasonable probability that it would have been effective. Second, the trial court reasonably concluded that petitioner was not prejudiced by counsel's treatment of Mr. Aubrey as a weapons expert. Again, there was no question as to the type of weapon used, and Aubrey was a hunter with a good knowledge of guns. [RT at 168.] Any objection to the prosecution's reliance on Aubrey's familiarity with weapons would have been futile, and counsel's own reliance on that familiarity was sound.

Petitioner further contends that the trial court declined to pursue

evidence concerning defense counsel's health, and disposed of the above issues summarily, relying on the judge's own observations. [Pet. at 21-22.] However, the trial judge was entitled to make use of his own observations of events that occurred at trial, and the effect, if any, they had on him or may have had on the jury. As to petitioner's claims about counsel's health, these do not state additional instances of alleged error by counsel, but rather express petitioner's theory about the reason for counsel's allegedly incompetent performance. Such a theory does not meet petitioner's burden to show that specific unreasonable or incompetent conduct by counsel caused actual prejudice. See, e.g., Dows v. Wood, 211 F.3d 480, 485-488 (9th Cir. 2000)(evidence that trial counsel, who was later diagnosed with Alzheimer's disease, was already experiencing its effects at the time of trial, does not establish prejudice per se, or prove Strickland error absent a showing of legally relevant deficient performance and actual prejudice).

D. CONCLUSION

As discussed above, petitioner has met the competence prong of Strickland on at least two claims: failure to pursue the possible third party culpability defense, and failure to use an eyewitness identification expert. These two claims are, in effect, cumulative, in that, without a theory that a third party was the perpetrator, the defense was left, essentially, with a weak alibi, and the need to overcome a strong eyewitness identification. Furthermore, if this were de novo review, this court might well find that counsel's deficiencies prejudiced petitioner. However, because of the

deferential AEDPA standard, in order to reject the state court decision in this case, this court would have to find that the trial court's decision, after an extensive evidentiary proceeding, was clearly erroneous or objectively unreasonable. The record does not support such a determination, based on either petitioner's two strongest claims, on any of his other individual claims, or on any cumulative effect of all meritorious claims taken together. Instead, this case appears to fall within the ambit of § 2254(d) deference, as the statute has been interpreted in Williams, Van Tran, and Delgado, supra.

VI. RECOMMENDATION

For the reasons discussed above, the Magistrate Judge recommends that the Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) denying the petition and dismissing this action with prejudice.

DATED: October 26, 2001

Carla M. Woehrle

CARLA M. WOEHRLE

United States Magistrate Judge